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Supreme Court, U.S.
FILED
OCT 6 - 2010
OFFICE OF THE CLERK

No. 09-1554

IN THE

Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF THE PETITIONER

SUSAN HAYS*
GEISLER HAYS, LLP
2911 TURTLE CREEK BLVD.
SUITE 940
DALLAS, TEXAS 75219
(214) 367-6040
shays@ghlawllp.com
**Counsel of Record*

DAVID HORAN
ANDREW WIRMANI
JONES DAY
2727 NORTH HARWOOD ST.
DALLAS, TEXAS 75201
(214) 969-5124
dlhoran@jonesday.com
aowirmani@jonesday.com

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2000
DALLAS, TEXAS 75201
(214) 270-1400
etomko@cttlegal.com
jross@cttlegal.com

COUNSEL FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Government contends that Shelby's Petition presents only an unusual circumstance and no pervasive legal error. However, the Government's own insistence that this Court granted and decided *United States v. Yeager* — yet changed no law — and that *Richardson v. United States* means something far broader than its plain language and scope of analysis provide, disseminates the error of the decision below to innumerable other defendants, and thus threatens the constitutional protections of the Double Jeopardy Clause and the procedural protections of the *Cohen* doctrine for all.[1]

I. Because the Fifth Circuit, the District Court, and the Government All Insist That *United States v. Yeager* Did Not Alter the Fifth Circuit's Prior Formulation of *Ashe*, This Court Should Grant Review.

A. *Yeager* Undoubtedly Altered the Fifth Circuit's Issue Preclusion Methodology.

The Fifth Circuit's prior mis-formulation of the issue preclusion test in *Ashe v. Swenson*, 397 U.S. 436 (1970), was worthy of this Court granting a writ of certiorari. *See United States v. Yeager*, 129 S. Ct. 2360 (2009). The lower court's taciturn stance that *Yeager* posed no change to its reversed opinion's methodology warrants review. The Fifth Circuit

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[1] *Richardson v. United States*, 468 U.S. 317 (1984); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

directly and more broadly compared the jury's "decision" on the hung counts with its verdict on the answered counts, finding itself unable to reconcile the two in F. Scott Yeager's case, but surmising that in Rex Shelby's case the jury must have believed he did not "use" knowledge of the purported far-reaching insider trading conspiracy when he sold stock in the summer, acquitting him on those counts, yet could have "used" such information during sales a few months earlier on the hung counts. *United States v. Yeager*, 521 F.3d 367, 372-73, 372 n.9, 373 n.11 (5th Cir. 2008) ("the timing distinction is obvious and one the jury could have made on its own"); *United States v. Shelby*, 447 F. Supp. 2d 750, 761-62 (S.D. Tex. 2006) ("the jury's acquittal is entirely consistent with the jury's failure to acquit"). In its Opposition, the Government jumps over the question of whether the Fifth Circuit applied *Ashe* incorrectly the first time and insists that this Court should simply move on, claiming there is no carnage to see here.

Shelby asks this Court to enforce the logic of *Ashe* and *Yeager* to a recalcitrant court of appeals by granting his Petition, vacating the Fifth Circuit order, and inculcating this Court's holding to the lower court which refused to render any decision on the merits after *Yeager* under the theory that the decision changed nothing in the Fifth Circuit's prior analysis. *See* 129 S. Ct. at 2368. All parties agree that the analysis should be based in the trial record, but disagree on what the record's boundaries are. By dismissing Shelby's appeal for want of jurisdiction, the Fifth Circuit insists on considering the hung counts by relying on its prior opinion and further insists on conjecture outside the record by surmising

that the jury must have decided that Shelby "used" knowledge of negative inside information when he sold stock in January to March 2000, but did not "use" it during his June and July sales. But on the trial record, no such argument that Shelby's mental state changed over time was ever made to the jury by the prosecution or by the defense. *Cf. United States v. Coughlin*, 610 F.3d 89 (D.C. Cir. 2010) (after *Yeager*, holding both the prosecution and the defense to the arguments made at trial to determine what the jury necessarily decided with a partial verdict of acquittal of earlier-in-time counts). Rather, the three defendants, Yeager, Shelby, and Joseph Hirko, put up a united front, all testifying that the Enron broadband technology worked, that the public was not deceived about the technology's functionality, and that there was no insider trading scheme at all.

The court to which the mandate in *Yeager* was directed persists in comparing acquitted and hung counts, but there is no permissible way to compare them. Both the Fifth Circuit and the district court claim they did not consider the hung counts in Shelby's case, but both explicitly reference those counts in their analysis. App. 5a-6a (quoting 521 F.3d at 373 ("the jury could have differentiated between the two different sets of trades")); App. 24a, 39a; 447 F. Supp. 2d at 761-62. The lower courts apparently believe they used the hung counts in a *permissible* way, but under *Yeager*, there is no permissible way to use or consider hung counts, either directly or indirectly. Rather, as amicus rightly argues, the acquittals should be reviewed as though this were a seriatim prosecution, and the hung counts did not exist at all. TCDLA Br. at 10-11.

When reviewing a partial verdict[2] such as Shelby's, the court should place its hand over the hung counts and review as though they do not exist at all. Otherwise, the court inevitably compares the counts, as the Fifth Circuit did here, speculating, as did the district court unabashed as it was,[3] that the jury must have believed Shelby did not "use" the insider information in the summer but could have in the spring. App. 5a-6a; 521 F.3d at 373, 373 n.11 ("because the jury could have made this timing distinction [between acquitted and hung counts], it did not necessarily make a factual determination that would bar a subsequent prosecution").

Under the Double Jeopardy Clause a jury's acquittal must carry constitutional weight. *Yeager* rightly limits the issue preclusion analysis to the "points in controversy" during the first trial. The Fifth Circuit, unmoored from the actual factual contest as it played out before the jury, answered that the jury "must have" latched onto the meaning of "use." But on the trial record below "use" was not a point in controversy nor even included in the three

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[2] The Government describes the verdict as "mixed." Opp'n at 3. This muddled language clouds the issue. "Mixed" more accurately describes a verdict of both acquittals and convictions. *See United States v. Powell*, 469 U.S. 57 (1984). This verdict is only "partial" as the jury reached some questions and gave a uniform answer to the questions it reached.

[3] "But they [the jury] rejected it [Shelby's credibility] the other time [for the hung counts]." App. 39a. "I think the Supreme Court looked at the hung counts in determining what effect the acquitted counts were." App. 24a.

"essential elements" of insider trading presented to the jury, but a definition buried at the end of the jury instructions. A temporal distinction of "use" was never an issue at trial — "use" appeared only in the sense that the defendants argued there was no scheme, the broadband technology worked, and thus they made no material misrepresentations to the public. That is, Shelby did not "use" the information because there was no negative, inside information to use at all. Thus, the factual determination the jury had to make to determine Shelby did not "use" negative insider information during his sales also squarely underlies the elements of the remaining counts. Had that opinion's logic been applied to the facts in *Ashe*, the court would have surmised that in acquitting the defendant on the robbery of one victim at the poker party, the jury believed him when he said it was a case of mistaken identity, but may not believe him in a subsequent trial for robbing the other victims even though the defendant put up the precise same theory of his defense. *See Ashe*, 397 U.S. 436; *Yeager*, 521 F.3d at 373 n.11 ("[T]he jury could have accepted Shelby's defense for one set of counts and not the other.").

As in *Ashe*, as the prosecution framed its theory of the case, the broadband defendants put a limited number of points into controversy at trial. That the jury acquitted them of multiple counts demonstrates the jury necessarily decided those intertwined factual points in their favor. While the burden remains on the defendant to demonstrate the application of issue preclusion, the courts may not stretch their logical arguments so far as to moor them to points not in controversy during the trial and piece together

support for what the jury "must have" decided by picking a sentence or two from testimony or jury instructions that no party argued was important or worthy of the jury's attention. Instead, the courts are bound by the arguments actually made during trial. *See Ashe*, 397 U.S. at 444; *Coughlin*, 610 F.3d at 100-02. Because the prior Fifth Circuit opinion engaged in layers of conjecture to justify its logic,[4] and the lower court now refuses to apply the correct *Ashe-Yeager* test to Shelby's case, this Court should grant the Petition. The only question remaining in this case is whether the Fifth Circuit's application of the *Ashe* standard was infected by an improper standard the first time. The lower court still has not considered the merits of Shelby's motion to dismiss on Double Jeopardy issue preclusion grounds with the correct standard. All that is needed for this Court to do is issue a summary grant, vacate, and remand for a decision with the correct standard as applied by the recent D.C. Circuit decision in *Coughlin*. 610 F.3d 89.

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[4] To reach its conclusion that issue preclusion would not apply to Shelby's case, the Fifth Circuit had to surmise that: the jury must have differentiated between the two sets of trades, making the timing distinction "on its own," to conclude that Shelby must have "used" the inside information in the summer but not the spring. 521 F.3d at 372-73, 373 n.11. Further, the court presumed that the jury acquitted the summer counts because Shelby sold shortly after his options vested, even though the court couldn't tell when the stock sold in July vested. *Id.*, at 372 n.9. None of these arguments were made to the jury. (But the record does show that the stock sold in July had vested the previous year.)

B. Under the *Ashe-Yeager* Test, the Jury Necessarily Decided There Was No Scheme at All.

Given the Fifth Circuit's stubborn adherence to its prior flawed application of *Ashe* and refusal to acknowledge that *Yeager* changed its prior formulation, the question remains what did the jury decide when it acquitted:

- Rex Shelby of his four summer 2000 insider trading counts;
- Joe Hirko of two spring 2000 insider trading and twelve spring-to-fall 2000 money laundering counts; and
- Scott Yeager of his conspiracy, January 2000 securities fraud, and four winter-to-spring 2000 wire fraud counts.

All three defendants presented the same defense: there was no scheme, the technology worked, and the public was not misled about the state of the technology. Given this spread of the twenty-four acquittals, logically, how could the jury have believed there was any scheme at all? By this partial verdict of multiple acquittals and given the points in controversy at trial, the jury's answer was simple: the defendants did not do it.

II. The Government's Broad Definition of "Colorable" Mis-reads *Richardson* and Goaded the Fifth Circuit Into a Split with Other Circuits in Disregard of This Court's Prior Decisions.

The Fifth Circuit ignores this Court's decisions in *Abney*, *Behrens*, and *Arthur Andersen*, using a

misreading of a few sentences of *dicta* in *Richardson* to overcome that line of cases' holding that appealability under the *Cohen* doctrine is determined by the category of order appealed, not by the merits of the individual case.[5] *Yeager* rejected the Government's argument that *Richardson* stood for the proposition that it may always retry hung counts from a partial verdict. 129 S. Ct. at 2369-70. Rather, *Richardson* resolved a double jeopardy (but not an issue preclusion) challenge to retrial based on insufficient evidence underlying the hung count where the jury acquitted on one count. *Id.* The Government again asserts a misreading of *Richardson* to subvert the *Cohen* doctrine and thwart this Court's line of cases restraining the *Cohen* analysis to categories of orders. Because the Fifth Circuit has adopted the Government's position, this Court should grant Shelby's Petition.

The Fifth Circuit and the Government require a showing on the merits before a defendant can have the opportunity to be reviewed on the merits.[6] This illogic highlights the intense error of the dismissal below and the warping of the meaning of "colorable."

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[5] *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Abney v. United States*, 431 U.S. 651 (1977).

[6] Although the Fifth Circuit's logic is somewhat inscrutable, the court appears to believe that, as in *Richardson*, *see* 468 U.S. at 324 n.6, once it declares a case a loss on the merits, it can then declare a lack of jurisdiction. But *Richardson* only did so for future insufficient evidence cases, and did not declare a lack of jurisdiction over the case before it.

The ambiguity of the "colorable" inquiry has vexed the lower courts with definitions that vary from "possible," "not wholly insubstantial, immaterial, or frivolous," "seemingly valid," to "meritorious." *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240 (10th Cir. 2001). However, the merits should be irrelevant to the jurisdictional analysis; otherwise, the courts may find themselves unable to vindicate rights before they are lost. *Powell v. Ridge*, 247 F.3d 520, 527-30 (3d Cir. 2001) (Roth, J. concurring).

If the Government is successful in its equation of "colorable" with the ultimate merits of a case, then all issues subject to collateral review under the *Cohen* doctrine may be threatened by the decision below. *See Pierce*, 253 F.3d at 1241 (determining whether federal question jurisdiction is "colorable"). Or, if the Government's argument for a merits-based "colorable" determination only applies to double jeopardy orders, then we are back to Justice Holmes' point in *Oppenheimer* — it cannot be that the rights of a civil litigant are greater than those of a criminal defendant whose very freedom is threatened. *See Yeager*, 129 S. Ct. at 2367 n.4 (citing *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916)). No matter how extraordinary or weak a given case may be, appellate jurisdiction cannot be merits based. *United States v. MacDonald*, 435 U.S. 850, 859 n.6 (1978) (citing *Carroll v. United States*, 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case.")).

Further, added to the constitutional concerns to protect Double Jeopardy rights is the enormous advantage of a government prosecutor who choses to

go repeatedly against an individual. *See Will v. Hallock*, 546 U.S. 345, 352-53, 354 n. (2006). Because the right Shelby seeks to vindicate is "too important to be denied review," *Cohen*, 337 U.S. at 546, this Court should grant review to enforce uniform application of the *Cohen* doctrine.

The Government's invocation of *United States v. McAleer*, 138 F.3d 852 (10th Cir. 1998), only strengthens Shelby's point that "colorable" as used by *MacDonald* and *Richardson* could only refer to whether a case fits into a category of appealable order, not whether the merits of a case itself are worthy. *McAleer*, like *Richardson*, did not concern issue preclusion at all, but instead was a double jeopardy challenge brought after the district court granted a motion for new trial. In *McAleer*, the Tenth Circuit held that an appeal seeking to block re-trial on insufficient evidence grounds does not implicate the Double Jeopardy Clause at all, thus was not a "colorable" double jeopardy claim and did not qualify for the *Cohen* doctrine at all. 138 F.3d at 857. The Government's reliance on *McAleer* underscores its and some courts' confusion about the meaning of "colorable."

"Colorable" properly applied asks only whether a challenged order is in an appealable category at all, that is, whether there is "some possible validity" to the claim no matter what the ultimate merits of the case. The Government claims Shelby ignores this statement requiring "some possible validity" in *Richardson*. Opp'n Br. at 16. To the contrary Shelby believes the statement supports his Petition, as "possible" means just that, and once an order is in a category of appealable orders, that appeal has some

"possible" validity. As used in *Richardson*, "colorable" is not a comment on the relative value of the merits of a case.

Finally, the Fifth Circuit implies that because Shelby has been denied a writ of certiorari once before, his otherwise appealable Double Jeopardy order is not subject to review for him and him alone. This reliance on this Court's denial of Shelby's prior Petition demonstrates that once every few decades is apparently not too often to remind the lower courts that a denial of cert means nothing. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.). For that additional reason, this Court should grant Shelby's Petition.

In the prior trial, the Government lumped the three broadband technology defendants together, trying them on a simplified conspiracy theory of the case. The jury answered with not a single conviction and a partial verdict of acquittal. Now that its prior strategy failed miserably, the Government wishes for a second bite at the apple. The Double Jeopardy Clause prohibits a second bite when the jury has answered broad fact questions favorably for the defendants. This Court should grant Shelby's Petition for Writ of Certiorari to enforce its holding in *Yeager* for the proper application of the *Ashe* test and to prevent the further subversion of the *Cohen* doctrine.